IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 112.

ANNA V. WHITNEY, APPELLANT,

vs.

EDWIN B. HAY, APPELLEE.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

Counsel for appellee have just had opportunity to examine the brief of appellant (in proof sheets), and inasmuch as some matters are urged therein not covered in the brief of appellee as now printed, counsel respectfully submit the following as a supplemental brief on behalf of appellee:

(*a.*) The effort is made in appellant's brief to show that when the Pipers left the house on Corcoran street to go to Saratoga, *ostensibly* for only a temporary absence, it was really because of dissatisfaction on the part of the Pipers, and the inference is sought to be drawn therefrom that that was really a permanent severance of the relations. Such fact, however, is not supported by the evidence.

It has already been shown that on the night immediately preceding such departure, Dr. Piper, of his own volition

(and unknown to complainant for some time thereafter), made a will in accordance with his agreement, and the letters and communications from Saratoga, both from the Dr. and Mrs. Piper (already referred to), clearly indicate that the relations had not then been terminated.

That the relations were not considered terminated by either party while the Dr. was in Chicago is also clearly shown. The Dr. was taken to Chicago by Thomas, who had been Piper's agent for certain property in Chicago (*R., 213*), and complainant had been introduced to Thomas by Dr. Piper in 1882 (*R., 260*); the removal of the Dr. from Saratoga by Thomas was without complainant's knowledge (*R., 206*).

While in Chicago, after having been so removed, a number of letters were written by the Dr. to complainant, all showing his intention to return to his home in Washington.

Letter of March 13, 1893:

"Expect to start for Washington soon. Hope you will not go away from home to be gone long at a time, as I want to see you on my arrival" (*R., 209*).

Letter of April 11, 1893:

"I shall be in Washington before many weeks, I hope; everything looks that way" (*R., 209*).

It seems that the Dr. then went with Thomas to Hot Springs, from which latter place he wrote another letter:

"I deemed it best to make a visit to this place prior to my going to Washington. * * * I shall remain here for a week or ten days, when I shall return to Chicago, from thence to Washington, probably" (*R., 210*).

Letter of August 1, 1893:

"I will not write at all about business matters, or our relations to each other, but must wait for a personal interview when I hope all will be explained and settled between us. Affectionately, R. U. Piper" (*R., 210*).

A letter of August 23, 1893, written from Chicago:

"Send my next to me *personally* care of I. H. Frye, * * * 2839 Cottage Grove avenue" (*R., 210*).

(This was the first evidence given by the Dr. that his letters were being inspected, etc.—*R., 210.*)

In the same letter the Dr. continued:

"What I say to you in this, you must not even *hint* at all to any one. The Dr. will do everything I believe he can to prevent my coming East, and I think you had better come on here as soon as you can make it convenient. I *mean* to go back with you if I am able. He, the Dr., sees all my letters and hence I shall have to show him yours, as it will seem strange if I did not. * * * Get some official summons of some kind, as you can do before a committee in the Court of Claims, calling me to Washington. Something of the kind will ease matters very much" (*R., 210, 211*).

Letter of August 26, 1893:

"I cannot put on paper, nor must you even hint at what I write. Certainly I am treated with the utmost kindness and attention by Dr. Thomas and his family. * * * Be particular as to what I say as to coming to see me at the house, so that I can see you alone" (*R., 211*).

Then followed some letters and telegrams from Piper, because of his failure to hear from complainant, the latter, as it turned out, being away from the city (*R., 212*).

On August 30, 1893, Piper fell down stairs, and as a result was confined to his bed, so that when complainant went to Chicago, as so requested, he found Piper's condition such that he could not be removed at that time. At that visit the Doctor expressed a desire to come back with complainant, "and cried copious tears because he could not come" (*R., 213*).

The above letters would seem to indicate that during all that time Dr. Piper was most desirous of returning to his home in Washington, and was only prevented by a combination of circumstances.

(*b.*) It was in June, 1895, when the appellant visited complainant in Washington to ascertain from him the whereabouts and situation of Dr. Piper, and went to Chicago for the purpose of bringing him home, but instead took him to her home in Newport, Maine; the first information of which latter fact received by complainant was the receipt of a letter from Newport, dated June 22, 1895, advising complainant of his arrival at that place, the letter being in the handwriting of Miss Whitney and signed by the Doctor. That letter states:

"*I am here on a visit for the summer*" (*R., 218*).

Then followed the letter of July 3, 1895, referred to in appellant's brief, in which the following statement appears:

"Would you not like the whole house, providing we can make a treaty to that end?" (*R., 218*).

This letter was also in the handwriting of the appellant and signed "R. U. Piper, per W.," by her.

Still another letter, dated July 13, 1895, also in the handwriting of appellant, signed as before, "R. U. Piper, per W.":

"I am expecting to depend on you to arrange affairs in Chicago" (*R., 219*).

Again, July 21, 1895, a letter written by the appellant and signed as before, "R. U. Piper, per W.":

"You will come and stop with me while here, and I will hope to see you very soon" (*R., 219*).

Again, letter of July 30, 1895, written by appellant and signed as before, "R. U. Piper, per W.":

"I am very glad to know you are coming so soon" (*R., 219*).

Then, on November 2, 1895, another letter written by appellant and apparently signed by the Dr., concluding:

"With many thanks for your kind inquiries, I will say that we are all quite nicely now, and with the hope that this will find you and yours well, R. U. Piper" (*R., 221*).

It will be thus observed that Piper was, during his entire stay in Newport, under the control of appellant; that she conducted his correspondence for him, even to the extent, in many instances, of signing the letters for him. It is also a significant fact in this connection that while the Doctor's letters had always been of an affectionate character, the tone instantly changed when he arrived in Newport, until they became the most formal business letters, studiously avoiding all expressions of affection.

(c.) Counsel for appellant, as appears by their brief, seem to place considerable reliance upon the testimony of Piper taken in this case, and the denials therein. Counsel for appellee had not supposed that such testimony would be seriously urged for consideration in this case, and this for the reasons stated in the brief of appellee. It may, however, be proper to refer the court to some features of the testimony of Dr. Piper for the purpose of showing that it cannot be relied upon in this case. The Court of Appeals disposed of his testimony as follows:

"He is contradicted in many material points by the statements made in his own letters and by overwhelming proof of his declarations to the contrary. It is just, however, to say, that his whole deposition tends to corroborate the evidence of the impairment of his mind and memory in December, 1892" (*R., 325*).

Without here setting forth extracts from the testimony of Dr. Piper, the court is respectfully referred to his deposition as it appears in the record (*pp. 34–41*), from which it is conclusively shown that the Dr. made most extravagant de-

nials of everything, even in the face of his own letters, and as to many other matters, material to the case, he was unable to remember.

(*d.*) In support of the contention that the exact contract was vague and indefinite, and as to the exact beneficiary intended, etc., it is urged by appellant that the witness Brainard testified that the proposed provision was in favor, not of the complainant, but of the complainant's son, and reference is made to the record (*pp. 69–71*). There is no necessity for any misunderstanding as to what this witness said. He was interrogated as to the arrangement existing between the parties when they came to Washington to live with complainant, and said:

"My recollection is rather indistinct as to that. I learned that they intended to make their home with your family, and for living with you they intended to make your son Edwin their heir. * * * My impression was that your son was to be made an heir at that time" (*R., 269*).

The complainant had and has a son named Edwin, and it seems that this witness was confused in his recollection as to which "son Edwin" was referred to. He seemed to have thought that it meant Mr. Hay's son. That this witness was confused as to this is made entirely clear by a further statement in his testimony, where, being interrogated as to the provisions contained in the former will of Dr. Piper (the one drawn by William A. Cook and already fully referred to), and which will, it seems, testator destroyed at the time Mr. Brainard prepared the subsequent will, he states:

"Well, I think I have already stated in my testimony that there was a bequest in that will, according to the best of my recollection, in favor of Mr. Hay's son. I cannot state definitely what it was. I read it over. The will was destroyed and the matter passed out of my mind" (*R., 71*).

The above extracts from his testimony clearly show that the witness was confused as to the use of the term "son Edwin," and that his testimony in no way tends to make uncertain or indefinite the terms of the contract between the parties.

Appellant further refers to what is called an agreement (*Exhibit A, R., 281*) which was offered in evidence by defendant on the cross-examination of complainant, although its introduction was objected to at the time (*R., 235*). It may be remarked in connection with this paper that its production has never been explained in any way. It was not identified; it had never been executed by any one; complainant testified that he did not remember having ever seen it before or a copy of it (*R., 234*); and although Dr. Piper was examined at length in regard to the dealings between the parties, that paper was not then produced, was not then referred to, nor was it identified by him. It is simply a typewritten draft of what purports to be an agreement, and it was unexecuted. There is no proof by whom or when it was prepared, or that either of the parties ever saw it. So far as the allowance referred to in said paper is concerned, and which appellant states complainant admitted embodied substantially the feature of allowance, it may be remarked that complainant expressly stated that while no such agreement as that referred to in the paper had been made between the parties, yet he gave certain receipts to Dr. Piper acknowledging payment of miscellaneous sums of money (although no money in fact passed) to cover the payments made by complainant on account of certain expenditures made in the building and interior equipment of the new house, such as mantels, fire-places, steam heat, etc., the cost of which had been paid by complainant, and he was theoretically reimbursed by Dr. Piper by the passing of these receipts quarterly, the complainant stating that the Doctor was punctilious about such matters, and that it was to gratify the feelings, desire, and wish of the Doctor rather than as matter of business that

these receipts were passed in the manner indicated; but no money, in fact, passed, and, as testified by complainant—

"there never was any question of money between us, nor would there have been in any way, as I never took any money from Dr. Piper for anything whatever" (*R.*, *234–237*).

In conclusion, counsel ask attention to the following reply to certain additional matters urged in appellant's brief:

I.

WHEN TWO COURTS HAVE REACHED THE SAME CONCLUSION ON QUESTIONS OF FACT, THEIR FINDING WILL NOT BE DISTURBED UNLESS IT BE CLEAR THAT THEIR CONCLUSION WAS ERRONEOUS.

It is to be observed that in this case both the trial court and afterwards the Court of Appeals, on appeal, found from the evidence in the case that a contract existed between the parties, as claimed in the bills of complaint, together with its terms.

The burden of appellant's brief is directed to endeavoring to show that the conclusions of said two courts in respect of said matters of fact are erroneous.

It has been frequently decided in this court that the concurring decisions of both courts below upon questions of fact are to be followed, *unless clearly shown to be erroneous.*

> Morewood *v.* Enequist (23 How., 491); The Richmond (103 U. S., 540) and cases there cited; The Conqueror (166 U. S., 110); Compania de Navagacion *v.* Brauer (168 U. S., 123); Stuart *v.* Hayden (169 U. S., 1, 14); Baker *v.* Cummings (*id.*, 189).

It is therefore submitted that, under this rule of decision, this court will not review the conclusions of the two courts below on the effect of the evidence, as it certainly cannot be

said in this case that it is "clear that their conclusion was erroneous."

II.

THE DEFENSE OF LACHES.

Appellant, in the brief filed herein, assigns as error, *inter alia:*

"6. In not holding that complainant's delay in attempting to enforce the alleged contract was a bar to this suit."

It may be remarked that this defense was not raised, nor the foundation laid therefor, by any averments in the answer; it was not raised during the taking of the testimony; it was not raised at the hearing in the trial court; it was not raised or relied upon in any way at the hearing in the Court of Appeals or assigned as error therein, and the question is now presented for the first time, and it is urged by appellant that this court, of its own motion, should consider, at this late and last stage of the case, the doctrine of laches in determining whether or not complainant is entitled to the relief prayed.

In the case of Sullivan *v.* Railroad Company (94 U. S., 811) it seems to be held that it is not necessary that the defense of laches be laid by averment in the answer if it appears at the hearing that the case is open to such objection. It does not, however, appear in the report in that case whether that defense was raised for the first time on the hearing in the Supreme Court.

Conceding, however, for the purpose of argument, but not admitting, that such defense may be now alleged, it is submitted that the facts in this case do not, in any sense, fall within the reason of the doctrine now invoked.

The doctrine of laches is based upon grounds of public policy, necessary for the peace of society and the discouragement of stale demands; and this rule is most frequently ap-

plied where the difficulty of doing entire justice arises by reason of the death of the principal witness or witnesses, or where the original transaction has become obscured by the lapse of time. In such cases a court of equity will, therefore, not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence (Mackall *v.* Casilear, 137 U. S., 566; Hammond *v.* Hopkins, 143 U. S., 224).

Laches is not, like limitation, a mere matter of time, but principally a question of permitting the claim to be enforced where it is an inequity, founded upon some change in the relations of the property or parties (Ins. Co. *v.* Austin, 168 U. S., 685).

The question of laches depends upon whether, under all the circumstances, a person is wanting in due diligence in commencing his action (Townshend *v.* Vanderwerker, 160 U. S., 171). In this last case a decedent had agreed with complainant, in consideration of his contribution in money and labor—one-half of the original cost of a parcel of land and a dwelling house to be erected thereon—to convey him a half interest therein. This agreement was made in 1879, and complainant, during the years and ending with 1884, fully complied with his agreement. The promisor lived five years longer, namely, until 1889, when she died, without having carried out her agreement. Suit was filed for specific performance of the contract, and, among other things, the defense of laches was interposed; but the court held that under the facts in that case, because of the intimate personal relations between the parties, that she had treated him and spoken of him as a foster-child, that whenever she was urged to carry out her contract with him she acknowledged its justice, and assured him that she had provided for him in her will, saying that she intended the house to be his when she was done with it, etc. (the complainant did not know until her death that she had not kept her promise in that regard), such defense could not prevail.

So in this case the agreement was upon Dr. Piper's promise

that he would devise the property to complainant, and the agreement to make a will, so far as complainant had any knowledge, was performed on at least three occasions, and, while it is true that Dr. Piper, from August, 1892, until the filing of this bill, was not physically residing with complainant, at the same time the close relations between them were kept up, Mr. Hay making several trips to Chicago, at his own expense, at the request of the Doctor, to look out for and protect the Doctor's interest; and, until 1896 (the bill in this case having been filed in December of that year), Dr. Piper was consulting with complainant and complainant had made trips to Newport at his request, and at his own expense, in connection with the Doctor's business, and it was through no fault of complainant's that Dr. Piper continued to remain away from his home. But, aside from all this, it was not until the actual recording of the deed from Dr. Piper to Miss Whitney, on October 17, 1896 (although the deed had, in fact, been executed August 4, 1896, knowledge thereof was kept from complainant), that complainant had any information that Dr. Piper not only *intended* to violate his agreement, but that he had, in fact, then *violated* it, and put it out of his power, by such conveyance, to ever perform and keep the contract. Then it was, for the first time, that complainant had knowledge of the real situation, and knowledge of a kind which made it incumbent upon him to pursue, with reasonable diligence, such remedy as he might be entitled to. Immediately upon discovering the existence of record of such deed, complainant wrote to the Doctor, insisting that he had faithfully carried out his (complainant's) part of the contract (letter of October 20, 1896; R., 290). In reply, Dr. Piper wrote, stating that it did not seem to him that he should consult complainant in regard to giving the Washington house to his niece (letter of October 23, 1896; R., 224). Again, complainant wrote to the Doctor in regard to the matter on November 11, 1896 (R., 290–292). Within a month from that date he filed the bill.

Even conceding the soundness of the decisions to which reference is made or can be made, in relation to the assertion of stale claims, it will be found that each of such decisions rests upon the particular facts in the individual case, and that, giving the widest scope to those decisions, they fall far short of making it possible to say in this case that the complainant has, in any way, slept upon his rights, or that he has, in any way, failed to exercise reasonable and due diligence in the assertion of his demands. Courts, in giving effect to the doctrine of laches, have uniformly based their decisions upon the inequity of permitting the assertion of stale demands and claims as being against the peace and welfare of society and property rights, and have made the rule particularly applicable in three classes of cases: (*a*) where the parties or witnesses are dead, and thus making it difficult, perhaps impossible, to contradict a given state of facts; (*b*) where by reason of long lapse of time the original transaction has become obscured, and (*c*) where the parties or property have changed their relation or situation.

None of these elements exists in this case. All parties were alive, able to, and did, testify; the original transaction was not obscured by the lapse of time; further, the situation of parties and property had in no sense changed, and the rights of no innocent third parties had intervened. So far as the appellant is concerned, the grantee in the deed aforesaid, she was a mere volunteer, confessedly received title without any consideration, and had full notice of the situation between Dr. Piper and Mr. Hay, and had knowledge, as she expresses it, prior to the conveyance, that the Doctor would probably give his property to Mr. Hay by will.

Respectfully submitted.

JEREMIAH M. WILSON.
A. A. HOEHLING, JR.
E. B. HAY.

WASHINGTON, D. C., *November* 14, 1900.